

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY W. DEGRAW)	
Claimant)	
)	
VS.)	
)	
EXIDE TECHNOLOGIES)	
Respondent)	Docket No. 1,032,978
)	
AND)	
)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the December 30, 2008 Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on April 22, 2009.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for the claimant. Dustin J. Denning of Salina, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

It was undisputed that before the alleged date of injury claimant received treatment and was taken off work for a preexisting back condition. It was further undisputed that this preexisting back condition was not work-related. Claimant alleged that upon his return to work he suffered a work-related aggravation to his preexisting back condition.

The Administrative Law Judge (ALJ) found that claimant did not sustain his burden of proof that he suffered accidental injury arising out of and in the course of employment.

Claimant requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment; (2) whether claimant is entitled to temporary total disability compensation; (3) nature and extent of disability, if any; and, (4) whether claimant is entitled to past, present and future medical.

Respondent argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

Initially it should be noted that, at a minimum, all the testifying physicians in this matter agreed that the claimant did not suffer a permanent aggravating injury when he returned to work for respondent. Consequently, the dispositive issue is whether claimant suffered a temporary aggravation to his preexisting condition while performing his work duties from July 16, 2006 through August 21, 2006.

It is undisputed that claimant had suffered increasing low back pain in June 2006 and had sought treatment. There is no allegation that this condition was work-related. Claimant sought treatment with Dr. Charles H. Bossemeyer II, board certified in family practice. On June 2, 2006, claimant was examined and evaluated by Dr. Bossemeyer. Claimant complained of low back pain for the past few days with radiation into the right leg. He denied any significant injury. Dr. Bossemeyer diagnosed claimant with possible L5-S1 radiculopathy due to disk herniation. A CT scan was performed on June 7, 2006, and revealed a prominent right paracentral disk herniation at L4-5 with right nerve root compression. Epidural injections were ordered and claimant was taken off work.

During this time period claimant was off work under the Family and Medical Leave Act and received short-term disability payments. Claimant had a second epidural steroid injection on June 29, 2006. After that treatment the claimant went to the company physician on July 11, 2006, and indicated that he was pain free. The company physician released claimant to return to work on July 16, 2006. On August 7, 2006, claimant reported to the respondent's nurses station and complained of back pain which he thought might be related to the long hours he was working.

The plant nurse, Gidget Ramsey, had been present on July 11, 2006, when claimant had told Dr. Hanson that he was pain free. During the course of the conversation with claimant on August 7, 2006, she testified that claimant told her that his back had never gotten better. It was disputed whether she told him to come back and file an accident report if he felt his condition was work related and whether he had told her his back had never gotten better.

Claimant returned to Dr. Bossemeyer on August 10, 2006. Claimant again complained of low back problems despite three epidural injections. Claimant again noted he needed to stay at work if at all possible. The doctor recommended additional epidural injections. Dr. Bossemeyer testified that there were no appreciable differences in claimant's physical back condition between the June 7, 2006 CT scan and the December 15, 2006 MRI of claimant's back. Dr. Bossemeyer declined to offer an opinion whether claimant aggravated his preexisting low back condition while working for respondent. But Dr. Bossemeyer testified that he had seen claimant on June 2, June 21 and August 10, 2006, without claimant mentioning that his back pain was due to a work-related injury. And if claimant had told him that his work activities caused his low back discomfort, the doctor would have likely noted that in his notes.

After his visit to the respondent's nurses' station claimant returned to Dr. Bossemeyer, then saw Drs. Hanson, Monguoglu and Eisenhower and never reported a work injury to any of the doctors. Claimant had a meeting on December 21, 2006, with respondent's human resources manager, Jayne Cornish, to discuss the results of his December 2006 MRI. During that conversation claimant was told he could not be released to return to work and he asked what would happen if he claimed his back was a workers compensation injury. Ms. Cornish testified she felt that claimant was threatening a claim if not allowed to return to work. Ms. Cornish testified:

Q. When you had your December 21st, 2006 meeting with Mr. DeGraw and he said to you "Well, what would happen if I claimed it's a work comp injury?" how did you view that statement by him?

A. I felt like he was making a threat, if we didn't put him back to work he was going to go file a claim against us that wasn't valid.

Q. And why do you say it wasn't valid?

A. Because he wasn't claiming it was work-related, he was saying just "What if I do this because I need the money?" basically.¹

Ms. Cornish later explained that she did not believe claimant's condition worsened upon his return to work because of his contradictory statements. She testified:

¹ Cornish Depo. at 74-75.

Q. So you were aware that he got worse between July when he returned to work and August when he went off work, according to him?

Mr. Denning: Object to the form.

A. My difficulty in answering is because in August he said that the doctor didn't really want to release him in July, that he just convinced him because he needed to come back to work because he needed the money. I don't know that he was truly pain free based on that statement.

Q. Based on the information that he gave you as to his symptoms when he came back in July he was pain free?

A. That's the statement he made.

Q. Okay. And you're having difficulty simply believing or not believing what he told you?

A. He contradicted it later in August.²

In this instance, the Board finds the testimony of Ms. Ramsey and Ms. Cornish more persuasive than claimant and finds that claimant's back condition had never fully healed when he returned to work in July 2006. Claimant needed to return to work for financial reasons and thus told the physicians that he was asymptomatic.

In *Logsdon*³ the Kansas Court of Appeals noted that in the determination whether an injured worker's condition is a natural consequence of the primary injury or a new and distinct injury a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury.

Dr. MacMillan concluded claimant had not suffered a new or recurrent injury when he returned to work. Moreover, as pointed out by the ALJ, the claimant's alleged return of symptoms after his return to work clearly coincided with a time frame that the effects of the epidural injections would be wearing off. Dr. MacMillan testified:

Q. From the testimony in other depositions in this case it's been established that Mr. DeGraw was off work from June the 2nd, 2006, with a return to work on July 11th, 2006, and when he returned to work on July 11th, 2006, he worked for Exide for about a month to six weeks and was unable to continue work after August 21 of 2006. And looking at that time period when he returned to work in July 11th to

² Cornish Depo. at 79.

³ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

August 21st of 2006, did you find indication from your examination of Mr. DeGraw, review of the medical records, review of the diagnostic films, that his medical condition had been aggravated or intensified or accelerated by his work activities during that time period?

A. There's no objective evidence that anything in his spine has changed, and as I noted in my report, typically, the benefits of epidural steroids will wear off over the course of three to four weeks. So, if Mr. DeGraw returned to work around mid July and had a recurrence of his symptoms that ultimately caused him to stop working around the middle or latter part of August, that's right within the time frame of the epidurals wearing off.

Q. I believe the records indicated that he had - - did have epidural, lumbar epidural steroid injections by Dr. Stoskopf, another anesthesiologist, one on June the 21st of 2006, and in your experience the effect of a lumbar epidural steroid injection generally lasts somewhere around a month for relief of symptoms?

A. The dispersion of the drug kind of follows a bell shaped curve, where in the first few days there isn't much effect of the medication. The effect of the medication peaks at about two weeks from its point of administration and then over the next two weeks it slowly fades away. So that by the end of three to four weeks there is no more effective drug in the body. So it's not unusual for people who have a great benefit from the epidurals to find that the coverage lasts for a few weeks and they start to experience a recurrence of their symptoms.⁴

And Dr. Koprivica agreed that it was hard to know how much the return of the low back pain was due to the epidural steroid injections wearing off versus a new aggravating injury.

Consequently, the Board finds claimant's preexisting back condition had never fully healed when he returned to work and he has failed to meet his burden of proof that he suffered a work-related injury.

The Board is mindful that Dr. Koprivica initially testified that claimant had suffered a permanent aggravation to his preexisting back condition after he returned to work in July 2006. But Dr. Koprivica relied upon a history that claimant had been completely pain free. And when presented with claimant's testimony that he was symptom free after treatment with Dr. Eisenhower and after leaving his employment with respondent, Dr. Koprivica changed his testimony and agreed that he could not state within a reasonable degree of medical probability that claimant had suffered a permanent aggravation of his preexisting low back condition.

⁴ MacMillan Depo. at 9-11.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated December 30, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned agrees with the majority that claimant failed to prove he suffered any permanent injury performing work for respondent. However, claimant's work with respondent did cause a temporary aggravation of his preexisting back condition. As such, claimant would be entitled to temporary medical and disability compensation.

BOARD MEMBER

- c: John M. Ostrowski, Attorney for Claimant
- Dustin J. Denning, Attorney for Respondent and its Insurance Carrier
- Bruce E. Moore, Administrative Law Judge